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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Cool Gear International, Inc.
v.
Carla Dahl

Opposition No. 91153361 to application Serial No. 78098759
filed on December 17, 2001

Roberta Jacobs-Meadway, Richard E. Peirce and Patricia G. Cramer of Ballard Spahr Andrews & Ingersoll, LLP for Cool Gear International, Inc.

Patricia Docherty of Mulligan & Bjornnes PLLP for Carla Dahl.

Before Hohein, Bottorff and Holtzman, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Carla Dahl has filed an application to register the mark "UNCOMMONLY COOL GEAR FOR BABY" for "plastic baby care accessories, namely[,] portable container[s] to clean and store a baby pacifier, partially transparent baby wipes container[s], [and] insulated and leak proof baby bottle container[s]."[1]

Cool Gear International, Inc., as set forth in its amended notice of opposition, has opposed registration on the

[1] Ser. No. 78098759, filed on December 17, 2001, which is based on an allegation of a bona fide intention to use the mark in commerce.

ground that it and its predecessor in interest have been "engaged in the development and sale of novelty items, housewares, containers of various sorts and the like since at least as early as August 1987"; that opposer "has used "Cool Gear" as a name and mark in commerce in connection with its business and its products"; that opposer's "use of the Cool Gear name and mark in connection with [the] development and sale of novelty and houseware items and containers has been continuous, commercially significant and substantially exclusive"; that opposer "has, since at least as early as January 10, 2001, used the Cool Gear name and mark on and in connection with various types of containers, including plastic buckets, plastic bottles sold empty, pitchers, plastic cups, canteens, and mugs"; that opposer is the owner of a valid and subsisting registration for the mark "COOL-GEAR" for "folding chairs with seats that act as food and beverage coolers";[2] and that applicant's mark "as applied to the goods set forth in the application is so similar to ... [opposer's] name and mark as used in and as applied to ... [its] business and products that it is likely to cause confusion, mistake, and/or deception."

Applicant, in her answer, has basically admitted that "information available at the USPTO website shows that Cool Gear, Inc., is the owner" of the registration pleaded by opposer for the mark "COOL-GEAR"; that "there are no restrictions on trade

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[2] Reg. No. 1,497,764, issued on July 26, 1988, which sets forth a date of first use anywhere of August 8, 1987 and a date of first use in commerce of August 10, 1987; combined affidavit §§8 and 15.

channels" set forth in the identification of her goods in the involved application; and that "she seeks registration of the mark for plastic containers in connection with baby accessories--[namely,] three containers to be exact: one container for holding a pacifier and cleansing liquid for a pacifier; one container for holding baby wipes; and one container for holding and insulating a baby bottle." Applicant, however, has in essence otherwise denied the remaining salient allegations of the amended notice of opposition.

The record consists of the pleadings; the file of the involved application; and, as opposer's case-in-chief, a certified copy of its pleaded registration, showing that the registration is subsisting and is owned by opposer, which opposer made of record by means of a timely filed notice of reliance thereon. Applicant did not take testimony or otherwise submit any evidence. Only opposer filed a brief and an oral hearing was not requested.

Inasmuch as there is no evidence to support opposer's allegations of prior common law rights in the mark and trade name "Cool Gear" in connection with, respectively, "various types of containers, including plastic buckets, plastic bottles sold empty, pitchers, plastic cups, canteens, and mugs," and the business of "development and sale of novelty and houseware items and containers," no further consideration will be given thereto. However, since opposer has proven that, as indicated above, its pleaded registration for the mark "COOL-GEAR" for "folding chairs with seats that act as food and beverage coolers" is subsisting

and is owned by opposer, priority is not in issue with respect thereto. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). Opposer's ownership thereof, moreover, serves to establish its standing to bring this proceeding. Id. Thus, as opposer recognizes in its brief, the sole issue to be determined in this case is whether applicant's "UNCOMMONLY COOL GEAR FOR BABY" mark for plastic baby care accessories, namely, portable containers to clean and store a baby pacifier, partially transparent baby wipes containers, and insulated and leak proof baby bottle containers, so resembles opposer's "COOL-GEAR" mark for folding chairs with seats that act as food and beverage coolers as to be likely to cause confusion as to the source or sponsorship of the parties' respective goods.

Upon consideration of the pertinent factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), for determining whether a likelihood of confusion exists, we find that opposer has not met its burden of demonstrating that confusion as to source or sponsorship is likely to occur. In particular, with respect to the two key considerations in any likelihood of confusion analysis, which as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), are the similarity or dissimilarity in the goods at issue and the similarity or dissimilarity of the respective marks in their entireties,[3] it is

[3] The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." 192 USPQ at 29.

the case that neither of such factors favors opposer in this proceeding.[4]

As to the respective marks, opposer maintains that they have the same sound, appearance and commercial impression. In particular, opposer offers the argument that the words "COOL GEAR," which are "in essence identical" to its mark "COOL-GEAR," constitute "the dominant component of Applicant's mark" inasmuch as "the laudatory term 'UNCOMMONLY' and the generic designation 'FOR BABY'" "do not distinguish applicant's mark from opposer's registered mark." However, when the marks at issue are considered in their entireties, including the descriptive words in applicant's mark, such marks are not only aurally and visually distinct, but they convey sufficiently different commercial impressions and are therefore distinguishable. Opposer's mark "COOL-GEAR," obviously, is highly suggestive of gear for keeping food and beverages cool, although it also possesses a double entendre since its goods, namely, folding chairs with seats that act as food and beverage coolers, are "cool gear" in the sense of serving in a first-rate or clever manner the dual purpose of functioning as both a chair and a cooler.[5] Applicant's

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[4] While opposer, in its brief, also asserts that the "strength" of its mark "is reinforced by the lack of any evidence of any third-party use of any similar trademark," it is pointed out that the absence of evidence is not evidence of absence. Because there simply is no evidence of record concerning the *du Pont* factor of the number and nature of similar marks in use on similar goods, such factor is not applicable herein.

[5] We judicially notice, for example, that in this regard The Random House Dictionary of the English Language (2d ed. 1987) at 446 defines "cool" as an adjective meaning, *inter alia*, "**1**. moderately cold; neither warm nor cold: *a rather cool evening*. .... **14**. *Slang*. **a**.

"UNCOMMONLY COOL GEAR FOR BABY" mark, plainly, is also highly suggestive, but it engenders a significantly different overall commercial impression from than that conveyed by opposer's mark. Specifically, applicant's mark suggests that her portable baby care containers, including her insulated and leak proof baby bottle containers, are exceptionally clever or unusually first-rate baby gear, rather than simply uncommonly "cool gear" as implicitly argued by opposer[6]. Consequently, instead of merely appropriating the whole of opposer's mark without sufficient distinguishing elements, in this instance the descriptive terms "UNCOMMONLY" and "FOR BABY" appear in applicant's mark in a manner that serves to differentiate such mark from opposer's mark

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great; fine; excellent: *a real cool comic*. **b**. characterized by great facility; highly skilled or clever: *cool maneuvers on the parallel bars*" and at 793 lists "gear" as a noun connoting, among other things, "**2**. implements, tools, or apparatus, esp. as used for a particular occupation or activity; paraphernalia: *fishing gear*. .... **5**. portable items of personal property, including clothing; possessions: *The campers kept all their gear in footlockers*." In a similar vein, "The American Heritage Dictionary of the English Language (4th ed. 2000) at 403 defines "cool" as an adjective denoting, *inter alia*, "**1**. Neither warm nor very cold; moderately cold: *fresh, cool water; a cool autumn evening*. .... **6**. *Slang* **a**. Excellent; first-rate: *has a cool sports car*; *had a cool time at the party*" and at 729 sets forth "gear" as a noun signifying, among other things, "**2**. Equipment, such as tools or clothing, used for a particular activity: *fishing gear*. .... **3a**. Clothing and accessories: *the latest gear for teenagers*. **b**. Personal belongings, including clothing: *keeps her gear in a trunk*." It is well settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., Hancock v. American Steel & Wire Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and Marcal Paper Mills, Inc. v. American Can Co., 212 USPQ 852, 860 (TTAB 1981) at n. 7.

[6] We take judicial notice that The Random House Dictionary of the English Language, supra at 2057, defines "uncommonly" as an adverb meaning "**1**. in an uncommon or unusual manner or degree. **2**. exceptionally; outstandingly. **3**. rarely; infrequently."

when the respective marks are considered in their entireties in relation to the goods at issue.

Nevertheless, even if applicant's and opposer's marks were to be considered confusingly similar, it is still the case that the goods at issue herein are not so similar that, if marketed under the respective marks, confusion as to the origin or affiliation of such products would be likely. Opposer urges, however, that its goods and those of applicant are "closely related" because "[b]oth are used for beverage containers and storage of other items and are used by, or for, babies and children." Further contending that because the goods at issue "are marketed to overlapping classes of individuals," opposer maintains that "there is a likelihood of confusion as to the source of the products." Specifically, opposer insists that:

> Opposer's registration does not limit the material of its goods, so [like applicant's goods] they too may be made of plastic. Indeed, it is common for food and beverage coolers to be made of plastic. It is also common for food and beverage coolers to be used to hold items used for or by babies or children, including baby bottles, pacifiers and other items that parents want to keep clean and/or cold before they are used, such as at the beach, pool, park or on long car trips. Because the goods of the Applicant's application and Opposer's registration are complementary to one another as to their uses, they are such as are typically displayed in close proximity. If Applicant's mark appears on its goods near Opposer's mark on its goods, the average purchaser is reasonably likely to think that the source of "COOL-GEAR" cooler chairs is also the maker of the "UNCOMMONLY COOL GEAR FOR BABY" containers and bottle carriers.
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> .... The application herein opposed has no limitations on the channels of trade and

> methods of distribution for the goods, and the goods may be featured and sold in any retail or discount store or any catalog that features novelty items, including Target, Kohls, drugstores, supermarkets, Kids 'R US, such as are Opposer's goods. Opposer's goods are such as are marketed and sold to, among others, the same and overlapping class of end users.

While we concur with opposer that the factor of the similarity or dissimilarity in the parties' goods and the nature thereof must be determined on the basis of the identifications of those goods as set forth in the involved application and pleaded registration, the mere fact that goods of the kinds at issue herein may be sold through the same channels of trade to the same class of ordinary consumers does not establish that such goods are "closely related." Applicant's plastic baby care accessories, namely, portable containers to clean and store a baby pacifier, partially transparent baby wipes containers, and insulated and leak proof baby bottle containers are, on the face thereof, distinctly different products from opposer's folding chairs with seats that act as food and beverage coolers. The sole attributes which the respective goods would appear to have in common are that applicant's baby bottle containers, on the one hand, and opposer's chairs with seats which double as food and beverage coolers, on the other, are both insulated so as to keep beverages cool and are portable. The fact remains, however, that applicant's goods are basically accessory containers for baby care while opposer's goods are essentially chairs, the seats of which also serve as food and beverage coolers. Even though it is apparent that the typical purchasers of such items would include,

for instance, adults who are parents of babies, there is no evidence that such diverse products would be sold, for example, in proximity to each other in the same mass merchandisers and/or specialty retail outlets or would otherwise be marketed in such a manner that consumers would regard the respective goods as produced or sponsored by the same source.

Thus, where the goods of the parties are on their face specifically different, as is the case herein, it is incumbent upon opposer, as the party having the burden of proof, to show that such goods are related in some viable fashion and/or that they are marketed or promoted under circumstances and conditions that could bring them to the attention of the same purchasers or prospective customers in a situation or circumstances that could cause such consumers reasonably to assume, because of the identity or substantial similarity of the parties' marks, that the particular goods share a common origin or sponsorship. See, e.g., Amcor, Inc. v. Amcor Industries, Inc., 210 USPQ 70, 78 (TTAB 1981). Here, opposer has offered only generalizations and speculative assertions. Given the absence of any evidence of a viable relationship between the respective goods, opposer has failed to meet its burden of proving that confusion is likely to occur from the contemporaneous use of the marks at issue. Moreover, while opposer has variously characterized the respective goods as "beverage containers" and "novelty items," it is settled that the mere fact that a term may be found which encompasses the parties' products does not mean that customers will view the goods as commercially or otherwise closely related

in the sense that they will assume that they emanate from or are associated with a common source. See, e.g., General Electric Co. v. Graham Magnetics Inc., 197 USPQ 690, 694 (TTAB 1977); and Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd., 188 USPQ 517, 520 (TTAB 1975).

Accordingly, the record fails to demonstrate that there is a likelihood of confusion from the contemporaneous use by applicant of the mark "UNCOMMONLY COOL GEAR FOR BABY" for plastic baby care accessories, namely, portable containers to clean and store a baby pacifier, partially transparent baby wipes containers, and insulated and leak proof baby bottle containers, and the use by opposer of the mark "COOL-GEAR" for folding chairs with seats that act as food and beverage coolers. As our principal reviewing court has repeatedly cautioned, "[w]e are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal." Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), quoting from Witco Chemical Co. v. Whitfield Chemical Co., 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g*, 153 USPQ 412 (TTAB 1967).

Decision: The opposition is dismissed.